BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTONIA GONZALEZ-GUTIERREZ	)	
Claimant	)	
	)	
VS.	)	
	)	
ACCESSIBLE HOME HEALTH	)	
Respondent	)	Docket No. **1,058,379**
	)	
AND	)	
	)	
ULLICO CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 15, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller . Randy S. Stalcup, of Andover, Kansas, appeared for claimant. Lara Q. Plaisance, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated October 12, 2012, with exhibits, and the deposition of Antonia Gonzalez-Gutierrez dated June 7, 2012, as well as all pleadings contained in the administrative file.

ISSUES

The ALJ found claimant's job duties required her to go out into the weather (including, in this claim, windy conditions) to properly attend to the needs of her clients, including shopping at the grocery store. Judge Fuller found claimant's accidental injury arose out of and in the course of her employment and ordered respondent to pay temporary total disability benefits (TTD) and provide authorized medical treatment.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of her employment. Respondent argues claimant was exposed to no greater risk of sustaining injury by strong winds than was the general public.

Claimant filed no brief with the Board.

The sole issue raised for the Board's consideration is whether claimant's accidental injury arose out of and in the course of her employment.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the written argument filed in the matter, the undersigned Board Member finds:

In 2009 claimant was hired by respondent as a caretaker of elderly people (referred to in the record as "clients") who remained living in their own homes. Claimant's job required her to attend to the personal, day-to-day needs of her clients, which included housekeeping, bathing and dressing the clients, cooking, taking out trash and shopping for groceries. Claimant would either drive the client to the store to shop or do the shopping herself.

On April 15, 2011, claimant fell while descending two or three steps outside a client's home. Claimant intended to drive to the grocery store to shop for some items necessary to finish preparing supper for the client.[1] As claimant stepped down, she fell and sustained injuries. At the time of her fall claimant was hit by a wind gust of approximately 70 mph. Claimant was uncertain if she slipped and fell or if she was knocked over by the wind.[2] In her deposition, claimant described how her accident occurred:

> Because I was telling Randy [presumably a reference to claimant's counsel] that it looked like I come out, I went down the stairs and I started walking and before I knew it it felt like, you know, something had picked me up and threw me down. Because the wind was 70 miles an hour that day here in town. So I don't know if I tripped or -- I don't know. All I know is I came down hard.[3]

Claimant was still "on the clock" when her accidental injury occurred.[4] Claimant was neither coming to work or going from work when the accident occurred.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

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[1] Gonzalez-Gutierrez Depo. at 28.

[2] *Id*. at 37.

[3] *Id*. at 23.

[4] *Id*. at 28.

right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee sustains personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts of the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

In *Faulkner*,[8] the Kansas Supreme Court stated:

> When the injury occurs from the elements, such as a tornado, or the like, the rule is that in order for it to be said the injury arose out of the employment, and thus compensable, it is essential there be a showing that the employment in some specific way can be said to have increased the workman's hazard to the element–that is, there must be a showing of some causal connection between the

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[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

[8] *Faulkner v. Yellow Transit Freight Lines*, 187 Kan. 667, Syl. ¶ 2, 359 P.2d 833 (1961); see also *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

employment and the injury caused by the element, and that his situation was more hazardous because of his employment than it would have been otherwise.

ANALYSIS

The ALJ found *Bach*[9] distinguishable from this claim. In doing so, Judge Fuller concluded this claim is compensable because the evidence established a causal connection between the claimant's injury and her employment. The undersigned Board member agrees.

When an injury is due to weather, such as wind or excessive heat, there must be a showing that the employment increased the risk of injury above the risk to which the general population is exposed.[10]

It is undisputed claimant was obligated, as part of her job responsibilities, to grocery shop for her client. Claimant was required to drive as part of her duties. Claimant was obligated to ensure the client was properly fed. The record supports the conclusion claimant was leaving the client's home on the day of the accident for one reason, and one reason only: to drive to the grocery store to buy ingredients necessary to complete the preparation of the client's supper. Claimant was still "on the clock" when she was injured. There can be no doubt claimant's accidental injury occurred in the course of her employment.

This claim is distinguishable from *Bach*. Ms. Bach was off duty and had clocked out when she left her employer's facility and was knocked down by a wind gust. Ms. Gonzalez-Gutierrez was very much still on duty and actively engaged in performing her job duties when she was injured. Ms. Bach was under no obligation to walk to the parking lot when she did. However, Ms. Gonzalez-Gutierrez was required to grocery shop when that function was necessary to properly care for the elderly person in her charge. The client was evidently not able to drive or prepare appropriate meals. It was accordingly claimant's responsibility to do so.

The general public, just like Ms. Bach, likely had options to stay in protected areas that provided shelter from the high winds. The nature of claimant's job, however, made it necessary for her to go outside when she did so, thereby increasing her risk of injury from the windy conditions.

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[9] *Bach v. National Beef Packing Co.*, No. 107681 (Kansas Court of Appeals unpublished opinion filed Dec. 21, 2012), aff'g. *Bach v. National Beef Packing Co.*, No. 1,044,800, 2009 WL2864513 (Kan. WCAB Aug. 11, 2009).

[10] *Faulkner v. Yellow Transit Freight Lines*, infra; *Taber v. Tole Landscape Co.*, 181 Kan. 616, 313 P.2d 290 (1957).

CONCLUSION

The undersigned Board Member agrees with the ALJ that claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on April 15, 2011.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member finds that the October 15, 2012, preliminary hearing Order entered by ALJ Pamela J. Fuller is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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[11] K.S.A. 44-534a.

[12] K.S.A. 2010 Supp. 44-555c(k).